Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

RONALD WARRUM, in his capacity
As Personal Representative of the Estate of
JOSEPH SAYYAH, Deceased
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 1402(b), 2401, 2402, 2412, 2671-2680.). Where a claimant has timely filed a tort claims notice alleging medical malpractice and subsequently dies, the Estate or personal representative of the deceased claimant must file an additional tort claims notice in order to maintain a cause of action for wrongful death.

PARTIES TO THE PROCEEDINGS

Petitioner is Ronald Warrum in his capacity as Personal Representative of the Estate of Joseph F. Sayyah, deceased.

Respondent is the United States of America, (hereinafter "Government").

CORPORATE DISCLOSURE STATEMENT

No party to the proceedings is a corporation.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald Warrum, in his capacity as Personal Representative for the Estate of Joseph Sayyah (hereinafter "Sayyah"), deceased, by counsel Robert R. Faulkner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Warrum v. United States of America*, 427 F.3d 1048 (7th Cir. 2005). It is reproduced in the Appendix at

App. 2. The order of the United States Court of Appeals denying rehearing is reproduced in the Appendix at App. 20. The opinion of the District Court granting Respondent's Motion for Summary Judgment is unreported and is reproduced in the Appendix at App. 14.

JURISDICTION

The Court of Appeals judgment was entered on October 25, 2005. A timely Petition for Rehearing was filed and denied on February 14, 2006, (App. at 20). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The statute principally involved in this matter is commonly known as the Federal Tort Claims Act found at 28 U.S.C. §§ 1346(b), 1402(b), 2401, 2402, 2412, 2671-2680. The relevant portions of the Federal Tort Claims Act as included in Article 28 of the United States Code are set forth below:

§1346(b) (1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the

Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§2401(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

§2674. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee

of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.
With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter

§2675 (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.
(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented

to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§2679. (a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346 (b) of this title, and the remedies provided by this title in such cases shall be exclusive.

STATEMENT OF THE CASE

Petitioner seeks review of the ruling of the Seventh Circuit Court of Appeals which held that where a claimant has timely filed a tort claims notice based upon tortious conduct, the foreseeable results of which could be death, the claimant then dies allegedly from the tortious conduct, the estate or personal representative of the claimant must then begin the process over and file a new tort claims notice in order to prosecute a claim for wrongful death.

Joseph Sayyah was a Vietnam Veteran being treated at the VA clinic in Evansville Indiana. As alleged by Sayyah's tort claims notice health care providers at the VA clinic failed to timely diagnose

cancer of the esophagus leading to a decreased chance of favorable treatment of Sayyah's cancer. Sayyah's cancer was discovered on March 9, 1999. Sayyah filed his tort claims notice on December 19, 2000. Mr. Sayyah died of cancer of the esophagus on February 4, 2002. Warrum in his capacity as personal representative of Mr. Sayyah's estate filed the complaint on May 22, 2002. On September 5, 2002 the Government filed its initial answer to Warrum's complaint. As Sayyah was a Vietnam War veteran being treated by the Department of Veterans Affairs the Government would necessarily have known when he died and knew at the latest on May 22, 2002 that Sayyah had died. Notwithstanding this knowledge the Government lay in wait until almost two years to the day from the date Sayyah died and filed a motion for leave to amend its answer to allege that no wrongful death tort claims notice had been filed. On September 22, 2004 the District Court granted the Government's motion to dismiss and alternative motion for summary judgment. On October 22, 2004 Warrum timely filed a Notice of Appeal. The Seventh Circuit decision was entered on October 25, 2005. Petitioner timely filed a petition for rehearing with suggestion for rehearing en banc on December 8, 2005 which was denied on February 14, 2006.

REASONS FOR GRANTING OF THE PETITION

A. The Decision in the Seventh Circuit Below Creates a Split Among the Circuits and Contravenes Its Own Authority by Requiring a

Claimant to State the Cause of Action in Its Tort Claims Notice

The Seventh Circuit's decision is in direct conflict with the decision of at least one other circuit which does not require a second, additional tort claims notice for the same act or omission in order to prosecute a wrongful death cause of action where a timely tort claims notice has been filed with respect to the tortious conduct and the tort victim later dies of his injuries. The Seventh Circuit predicated its ruling on analysis of when a "cause of action" for wrongful death accrues which is largely irrelevant because a "claim" under the FTCA is not the same thing as a "cause of action". The Seventh Circuit unnecessarily concerned itself with the issue of when a "cause of action" for wrongful death accrues by implicitly holding that a "claim" for purposes of the FTCA is the same as a "cause of action".

The Seventh Circuit on page four (4) of its opinion says "Although Sayyah filed a medical malpractice administrative claim notice after his cancer was diagnosed, an administrative claim for wrongful death was never presented to the agency." The underlying premise of that statement is the proposition a claimant has a duty to state his or her cause of action in the tort claims notice. This holding is contrary to the Seventh Circuit's own authorities which hold that the claimant need not specify a legal theory in order to have his or her claim be deemed sufficient. *Palay v. United States* 349 N.E.2d 418, 425 (7th Cir. 2003)(citing *Murrey v. United States*, 73 F.3d 1448,

1452 (7th Cir. 1996). The Seventh Circuit has created a split among the circuits by contravening authorities of other circuits which also hold that the claimant need not specify a legal theory to have his or claim be deemed sufficient. *Santiago-Ramirez v. Secretary of the Department of Defense*, 984 F.2d 16, 19-20 (1st Cir. 1993), *Broudy v. United States*, 722 F.2d 566, 568-569 (9th Cir. 1983), *Brown v. United States*, 838 F.2d 1157, 1160 (11th Cir. 1988). A form 95 is entitled to a generous construction. *Palay*, 349 F.3d at 425. Any cause of action fairly implicit in the facts listed in the form 95 will be considered a claim that was "presented" for purposes of the exhaustion requirement. *Id.* at 426. If the claim would have been apparent to a "legally sophisticated reader" of the form the agency will be charged with notice of the claim and deem it to have been exhausted. *Id.* A skeletal claim form containing only the bare elements of notice of accident and injury and a sum certain for damages is sufficient. *Goodman v. United States*, 298 F.3d 1048, 1055 (9th Cir. 2003). If a claim meets this requirement it is sufficient even if a separate basis of liability arising out of the same incident is pled in federal court. *Id.* A claimant must give an administrative agency only enough information to allow the agency to begin its own investigation. *Burchfield v. United States*, 168 F.3d 1252, 1255 (11th Cir. 1999). The claimant is not required to provide the agency with a preview of his or her lawsuit by reciting every possible theory of recovery or every factual detail that might be relevant. *Id.* The agency is deemed to be on notice not only of the theories of recovery stated in the claim, but of those theories that its reasonable investigation of the

allegations of the claim should reveal. *Id.* at 1255-1256. An administrative claim can put the agency on notice of theories not stated in the claim. *Id.* at 1256. All that is required is that the theory put forward in the complaint be based on facts stated in the claim. *Id.* The 7th Circuit's opinion is in conflict with at least three other circuits on this issue.

The *Burchfield* case is also significant to this case, as there, the VA was charged with knowledge of information contained in its own files. *Id.* at 1257. Similarly, most if not all the relevant information as to Sayyah's claim was contained in the VA's own files.

The Eleventh circuit has addressed an almost identical circumstance as that presented here, recognized the practicalities involved and correctly applied the foregoing principles. Where an individual tort victim has filed a timely tort claims notice and subsequently dies, the purposes of the tort claims notice requirement do not require the decedent's estate to file a second tort claims notice based upon the same occurrence after the claimant dies. *Brown v. United States*, 838 F.2d 1157, 1160 (11th Cir. 1988). There, the government took the exact same position under almost identical circumstances. The government alleged that the estate could not maintain a wrongful death action based upon the fact that the decedent's tort claim notice did not mention "wrongful death", *Id* at 1159. The court there began its analysis pointing out the well settled principle that the notice requirement does not require a claimant to enumerate

each theory of liability in the claim, *Id* at 1160. The Court then went on to state:

> "Compelling a claimant to advance all possible causes of action and legal theories is "overly technical" and may frustrate the purpose of section 2675(a) notice requirement. *Mellor v. United States*, 484 F.Supp. 641, 642 (D.Utah 1978). A "claim" is not synonymous with a "legal cause of action." *Nelson v. United States*, 541 F.Supp. 816, 818 (M.D.N.C. 1982); *Mellor*, 484 F.Supp at 642. IN this case, the claim filed by Charlie Brown provided the VA with the facts necessary to conduct a full investigation of the underlying circumstances. Requiring the appellee to exhaust the administrative claim procedure again would serve no useful purpose [fn omitted]. It is unlikely that the agency would conduct a second investigation or otherwise act any differently.
>
> The United States also maintains that until the new claimant files an administrative claim the district court lacks subject matter jurisdiction because a "new, independent cause of action arose when Charlie Brown died." The Florida Wrongful Death Act provides that a wrongful death action may be maintained on behalf of statutory beneficiaries if the decedent was entitled to bring an action based on the wrongful event. *See* Fla.Stat §§ 768.19-20 (1985). Although a Florida wrongful death

> action is clearly distinct from a personal injury action, liability of a defendant in a wrongful death action is based on the negligent or wrongful act which injures the decedent. See *Martin v. United Sec. Servs. Inc.*, 314 So.2d 765, 770 (Fla. 1975). *Gaboury v. Flagler Hosp., Inc.*, 316 So.2d 642, 644 (Fla.Dist.Ct.App. 1975). "The death is not the operative fact upon which liability rests." *Nelson*, 541 F.Supp at 818. A new administrative claim is unnecessary for a wrongful death action because while a different legal injury is suffered, both actions are based on the same injury in fact. [fn. omitted] *But see Raymond v. United States*, 445 F. Supp 740 (E.D.Mich. 1978)(wrongful death claim is separate and distinct from personal injury claim under Michigan law). Although a new cause of action accrued at the time of Brown's death, the United States' liability is based on the same facts presented in Brown's administrative claim. We therefore hold that the district court properly exercised subject matter jurisdiction in this case." *Brown* 838 F.2d at 1161.

I.C. 34-23-1-1, as does the Florida wrongful death act, provides that a wrongful death action may be maintained on behalf of statutory beneficiaries if the decedent was entitled to bring an action based on the wrongful event. As under the Florida wrongful death act, a wrongful death action is distinct from a personal injury action however liability of a defendant under a

wrongful death action is still based upon the negligent or wrongful act which injures the decedent. *Spoonamore v. Armstrong World Industries,* 105 F.Supp.2d 928, 938 (S.D.Ind. 1999), *Drake Insurance Company of New York v. Carroll County Sheriff's Department*, 427 N.E.2d. 1153, 1156 (Ind.Ct.App. 1981). One of the cases cited in *Brown* was very similar on its facts to the instant case. *Nelson v. United States*, 541 F.Supp. 816, 818 (M.D. N.C. 1982). The Seventh Circuit grievously erred by deciding the same issue diametrically opposite from the well reasoned analysis of the Eleventh Circuit in the *Brown* case. If the Seventh Circuit had recognized the practicalities involved and applied the principles the Eleventh Circuit did in *Brown* it would not have had to concern itself when a wrongful death **cause of action** accrued because Sayyah's **claim** put the government on notice of facts out of which a wrongful death cause of action could arise.

For the government, the district court and the Seventh Circuit to hold that Sayyah's claim did not put the VA on notice of a potential wrongful death claim is necessarily to adopt the implausible proposition that the VA, as a matter of law, is ignorant of the universally known fact that patients who suffer from undiagnosed or misdiagnosed cancer tend to die. Consequently, certiorari is warranted to reconcile this conflict among the circuits and to correct the Seventh Circuit's departure from the accepted and normal course of judicial proceedings.

B. The Seventh Circuit also Created a Split Among the Circuits by Incorrectly Analyzing Accrual of the Wrongful Death Cause of Action

As noted above, the Seventh Circuit did not need to address the issue of when a wrongful death cause of action accrues because the facts alleged in Sayyah's claim put the government on notice of a potential wrongful death cause of action. The Seventh Circuit's opinion contravenes authority of the Fourth Circuit in *Miller v. United* States, 932 F..2d 301, 303 (4th Cir. 1991). That case was decided under Virginia's wrongful death statute which differs from that of Indiana in that it does not create a new cause of action for wrongful death, *Id.* Nonetheless, the analysis is applicable here as, under Indiana's statute in a medical malpractice case, accrual of the cause of action and commencement of running of the statute of limitations is a function of the date of occurrence of the tortious conduct, not the date of the resulting death.

The Fourth Circuit held that a wrongful death cause of action under Virginia's wrongful death statute, for purposes of the FTCA, accrues and the statute of limitations begins to run on the date the claimant first knows of the existence of an injury and its cause, *Id.*. The operative principle the Fourth Circuit relied upon in so holding is stated as follows: "For this reason, a wrongful death action under Virginia law is necessarily time-barred if at the time of the decedent's death her personal injury claim based upon the tortious conduct that ultimately caused death is already time-barred [citation omitted]." *Id.* The

foregoing recitation of Virginia law is practically identical to the Indiana statute of limitations for a wrongful death based upon medical malpractice which begins to run on the date of the occurrence of malpractice rather than date of death. *Hopster v. Burgeson,* 750 N.E.2d 841, 853 (Ind.Ct.App. 2001). Consequently, the fact that Virginia's wrongful death statute creates a derivative rather than independent cause of action is not a meaningful distinction as the accrual/limitations analysis is identical under Virginia law to that of Indiana in that circumstance. The Sixth circuit subsequently reached the same result relying upon the analysis in *Miller. Chomic v. U.S.,* 377 F.3d 607, 614 (6th Cir. 2004).

Both *Miller* and *Chomic* were applying the principle that the FTCA waives sovereign immunity to the extent that state law would impose liability on a private individual under similar circumstances, *Id.* at 609, *Miller,* 932 F.2d at 303. Both cases concluded that since state law was such that a cause of action for wrongful death accrued when the existence and cause of the injury were known rather than the date of death, for purposes of the FTCA the wrongful death claim would accrue on the same date. In such an instance the government's liability and exposure to suit would be the same as that of a private actor.

Under the Seventh Circuit's opinion the liability of the United States is far broader than that of a private health care provider in Indiana. In Indiana, as a general rule, claims against private health care providers, even those resulting in death, are barred two

years from the date of the occurrence of the malpractice. The United States' exposure is virtually unlimited. Under this opinion, the United States can be liable for a wrongful death attributable to medical malpractice five, ten, twenty or even fifty years after the occurrence. On the other hand, under Indiana law Sayyah's or his personal representative's prosecution of whatever causes of action arose out of his claim would be preserved under Indiana law by his taking action within two years of occurrence of the malpractice, which is contrary to the result reached by the Seventh Circuit.

The Fifth Circuit has reached a somewhat different result than either the Seventh, Eleventh or Sixth. There, the Fifth Circuit was confronted with a circumstance where the tort claims notice was filed more than two years after the tortious conduct, but less than two years after the victim's death. *Johnston v. U.S.*, 85 F.3d 217, 218 (5th Cir. 1996). In Texas, a wrongful death action is derivative rather than independent. *Id.* at 222. The Fifth Circuit held that, irrespective of state law, the interests of uniformity warrants a rule that a wrongful death cause of action can never accrue prior to death, *Id. at 224.*

The *Johnston* case further illustrates the folly of the Seventh Circuit in deciding this case based upon accrual of the "cause of action" and how that folly creates nonuniformity and inequity. One of the purposes of the statutory claim requirement is to provide for more fair and equitable treatment of private individuals and claimants when they deal with the

Government. *Erxleben v. United States,* 668 F.2d 268, 273 (7th Cir. 1981), *Blair v. United States*, 304 F.3d 861, 866 (9th Cir. 2002). In *Johnston*, the Fifth Circuit was guided by equity. *Johnston*, 85 F.3d at 224. In doing so, the Fifth Circuit saved the plaintiff's claim from expiration of the statute of limitations. *Id.* at 218. By its holding in *Fisk* the Seventh Circuit similarly saved the plaintiff's claim from expiration of the statute of limitations. *Fisk v. United States*, 657 F.2d 167, 173 (7th Cir. 1981). The Seventh Circuit spoke of its applying a "less restrictive federal rule". *Id.* at 172. What the Seventh Circuit has actually formulated a **more restrictive** federal rule which applies to plaintiffs who file a tort claims notice within two years of the negligence where the victim later dies before the matter can be resolved. Even if the wrongful death "cause of action" accrued on the date of death, if the Seventh Circuit had followed *Brown* recognizing that a "claim" alleging failure to diagnose cancer should put the government on notice of a potential wrongful death "cause of action" it could have been equitable to both types of plaintiffs. Instead, under the rule applied by the Seventh Circuit Sayyah's family and the plaintiffs in *Nelson* and *Brown* would be precluded from maintaining a cause of action because their tort claims notices would have been premature for a wrongful death. The Sixth Circuit disapproved of the analysis of the Fifth Circuit *Johnston v. United States*, *Chomic*, 377 F.3d at 612.

Other circumstances presented by this matter have created grievous inequity. Not only did the Seventh Circuit hold that the estate of a veteran who'd

been the victim of malpractice must engage in what other courts have concluded is the superfluous formality of filing another, almost identical, tort claim notice based upon the same acts and omissions as the first. In this matter, the government was Sayyah's primary health care provider. By its own admission it knew from its own records that Sayyah had died. Relying on the notion that lack of subject matter jurisdiction is not subject to waiver, the government intentionally lay in wait and intentionally withheld raising this issue until two years after Sayyah's death had passed. It was these tactics that the government undertook and the District Court and the Seventh Circuit have sanctioned and rewarded. This result is an affront to any consideration of fairness and equity which the cases attribute to the tort claims act.

C. The 7th Circuit's Opinion Creates a Split Among the Circuits by Its Failure to Properly Apply the Federal Rules of Civil Procedure in Construing Warrum's Complaint

On page 9 of its opinion the Seventh Circuit rejects Warrum's argument that, whether or not a wrongful death cause of action may be maintained, the complaint in the alternative states a survival claim based on Indiana's increased of harm/loss of chance doctrine set forth in § 323 of the Restatement (2nd) of torts (1965) which has been adopted by Indiana. *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1388 (Ind. 1995), *Cahoon v. Cummings*, 734 N.E.2d 535, 543-544 (Ind. 2000). In *Cahoon* the following jury instruction was at issue:

> "If you determine that the Defendant's negligence was not a substantial factor in Mr. Cummings' death, but the Defendant's negligence increased the risk of harm to Mr. Cummings by reducing his opportunity for a better result, and that increased risk was a substantial factor in that harm, then you should award such damages as will fairly compensate the Plaintiff for the harm sustained. Harm may be the loss of opportunity for cure, decreased short-term survival, or unnecessary physical pain and mental suffering. [Joann] Cummings is also entitled to be compensated for her loss of consortium....", *Id* at 543-544.

The Indiana Supreme Court observed that the instruction, while unclear, was an accurate statement of Indiana law. *Id* at 544. While a plaintiff may not recover on a survival claim and a wrongful death claim, he is allowed under Indiana law to pursue both theories to verdict, *Id* at 543. The complaint in this matter states a cause of action both for wrongful death and under the survival statute.

Paragraph 17 of the complaint refers to the administrative claim which Sayyah filed with the VA. That claim alleges in relevant part:

> "Failure to timely diagnose cancer of the esophagus leading to a decreased chance of favorable treatment of the claimant's cancer.".

Further, the complaint filed herein alleges in paragraph 12 as follows:

> "As a result of a [sic] negligence, carelessness and medical malpractice of the defendant's employees, Sayyah's condition caused him to suffer pain, mental anguish, bodily injury and ultimately caused his death."

The jury instruction upheld in *Cahoon* specifically includes unnecessary physical pain and mental suffering as an element of damages for the increased risk of harm/survival claim which are almost identical to the allegations of paragraph of the complaint filed herein. In fact, under Indiana law damages for pain and suffering are only recoverable in a survival action and not a wrongful death action. *American International Adjustment Company v. Galvin*, 86 F.3d 1455, 1458 (7th Cir. 1996) (R'hrg and Suggestion for R'hrg.Den.).

Paragraph 17 of the complaint specifically refers to the tort claims notice Sayyah had filed with the VA which specifically alleges "a decreased chance of favorable treatment of the claimant's cancer". A decreased chance of favorable treatment is absolutely synonymous with the increased risk of harm to which the Indiana Supreme refers in *Mayhue* and *Cahoon* when addressing a survival claim.

In ignoring the survival claim, the Seventh Circuit contravened its own authorities and well settled authority of other circuits governing construction of

pleadings. Under the Federal Rules of Civil Procedure, complaints are to be construed liberally; accordingly, a plaintiff is not required to plead facts or evidence to support his claims, nor is he required to set forth explicitly his theory of the case. *Rimer v. Illinois Department of Transportation*, 148 F.3d 800, 804 (7th Cir. 1998). A complaint need not specify in detail the precise theory giving rise to recovery, all that is required is that defendant be on notice as to claim being asserted against him and grounds on which it rests. *Evans v. McClain of Georgia, Inc.* 131 F.3d 957, 964, n. 2 (11th Cir. 1997). *Fitzgerald v. Codex Corp.* 882 F.2d 586, 589 (1st Cir. 1989). Plaintiff need not allege all the facts necessary to prove its claim so long as it provides enough factual information to make clear the substance of that claim. *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.* 148 F.3d 1080, 1086 (C.A.D.C. 1998) A complainant is entitled to plead in the alternative, even if the pleadings are inconsistent. *Kruse v. Wells Fargo Home Mortgage Company Inc.*, 383 F.3d 49, 55, n.3 (2nd Cir. 2004), *Taylor v. Pathmark Stores Inc.*, 177 F.3d 180, 189 (3rd. Cir. 1999), *Fluorine on Call Ltd. v. Flurogas Limited*, 380 F.3d 849, 865, n.22 (5th Cir. 2004), *Ayers v. U.S.*, 277 F.3d 821, 829 (6th Cir. 2002), *Alper v. Altheimer and Gray*, 257 F3d 680, 687 (7th Cir. 2001). When a pleader is legitimately in doubt about the facts, he may assert contradictory statements of fact, *American International Adjustment Company v. Galvin.* 86 F.3d 1455, 1461 (7th Cir. 1996). Having specified the wrong done to him or her, a plaintiff may substitute one legal theory for another without altering the complaint. *Albiero v. City of Kankakee*, 122 F3d 417,

419 (7th Cir. 1997). Form of complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 434 (5th Cir. 2000). Under Federal Rules of Civil Procedure, a court may not rely solely on labels in a complaint, and must probe deeper and examine the substance of the complaint. *Minger v. Green,* 239 F.3d 793, 799 (6th Cir. 2001). The label which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states. *Id.* It is not fatal to complaint that legal theory has been mischaracterized or that precise language invoking jurisdiction has not been used. *Torres Ramirez v. Bermudez Garcia*, 898 F. 2d 224, 226-227 (1st Cir. 1990). A complaint need not specify the correct legal theory or point to the right statute to be sufficient as a complaint merely describes the claim. *C&F Packing Company, Inc. v. IBP, Inc.* 224 F.3d 1296, 1306 (Fed.Cir. 2000). Consequently, the notion that the misdiagnosis causing Sayyah's death may be inconsistent with a survival action does not mean that the complaint cannot state a survival cause of action as well, the complaint does plead both causes as it is permitted to do under the Federal Rules of Civil Procedure. Consequently, even if the wrongful death claim was somehow barred, the District Court and 7th Circuit should have allowed Warrum to proceed on the survival action.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

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Supreme Court, U.S.
FILED
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD WARRUM, in his capacity
As Personal Representative of the Estate of
JOSEPH SAYYAH, Deceased
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-3753
RONALD WARRUM, in his capacity as
Personal Representative of the Estate of
JOSEPH F.SAYYAH, Deceased,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville
Division.
No. 02 C 92—Richard L. Young, Judge.

ARGUED APRIL11, 2005—DECIDED OCTOBER
25, 2005

Before POSNER, RIPPLE, and
SYKES, Circuit Judges.

SYKES, Circuit Judge. Ronald Warrum appeals the district court's dismissal of this wrongful death action brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq. Warrum, as personal representative of the estate of Joseph Sayyah, alleges that in 1998 Dr. Asif Ali, a physician at the Department of Veterans Affairs ("VA") clinic in Evansville, Indiana, failed to properly [2] diagnose

Sayyah's esophageal cancer and that the misdiagnosis caused Sayyah's death in 2002. The district court dismissed the action for failure to comply with the administrative exhaustion requirement of 28 U.S.C. § 2675(a), which prohibits the initiation of an action against the United States under the FTCA unless an administrative claim is first presented to the appropriate federal agency. Although Sayyah submitted a medical malpractice administrative claim to the VA after his cancer was diagnosed, a claim for wrongful death was never presented to the agency after Sayyah died. The district court concluded that because a wrongful death claim does not accrue for purposes of the FTCA until the date of death, the prior administrative claim for medical malpractice did not satisfy the exhaustion requirement of § 2675(a) for the wrongful death claim. We affirm.

I. Background

The complaint alleges that in September 1998 Sayyah was treated at the Evansville VA clinic by Dr. Ali, who failed to properly diagnose his medical condition. Sayyah was correctly diagnosed in March 1999 as suffering from Stage III cancer of the esophagus. On December 19, 2000, Sayyah filed an administrative tort claim notice with the VA, alleging that the doctors and staff at the Evansville VA clinic failed to timely diagnose his cancer, resulting in a decreased chance of favorable treatment. This claim was denied on November 27, 2001. Sayyah died on February 4, 2002. On May 22, 2002, Warrum, as personal representative of Sayyah's estate, brought this wrongful death action

against the United States under the FTCA, alleging that the misdiagnosis by Dr. Ali and his staff at the Evansville VA clinic resulted in Sayyah's death.

The government moved to dismiss based upon failure to comply with the administrative exhaustion requirements [3] of § 2675(a)—specifically, the failure to file an administrative claim following Sayyah's death and prior to initiating this FTCA suit for wrongful death. The district court granted the motion, concluding that Sayyah's administrative notice of claim for medical malpractice did not satisfy the administrative claim requirement for the wrongful death action. Relying on our decision in *Fisk v. United States*, 657 F.2d 167, 170 (7th Cir. 1981), the court held that because a cause of action for wrongful death under the FTCA does not accrue until the date of death, the earlier medical malpractice administrative claim did not suffice as an administrative claim for the wrongful death. Warrum appeals.

II. Discussion

The FTCA is a limited waiver of the sovereign immunity of the United States and imposes liability "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *Charlton v. United States*, 743 F.2d 557, 558 (7th Cir. 1984). Accordingly, we look to state law—here, Indiana—to determine the substantive nature of the

plaintiff's cause of action. *White v. United States*, 148 F.3d 787, 793 (7th Cir. 1998); *Fisk*, 657 F.2d at 170. However, the FTCA imposes its own procedural rules—including the administrative exhaustion provision at issue here.

The FTCA's administrative exhaustion requirement provides that no action may be brought against the United States unless the claimant first presents the claim to the appropriate federal agency:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss [4] of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *unless the claimant shall have first presented the claim to the appropriate Federal agency* and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a) (emphasis added). The Supreme Court has noted that the purpose of the FTCA's exhaustion requirement is to facilitate the administrative evaluation of tort claims by the agency whose activity gave rise to the claim and permit settlement of meritorious claims more quickly and without litigation. *McNeil v. United States*, 508 U.S. 106, 112, n.7 (1993); see also *Kanar v. United States*, 118 F.3d 527, 531 (7th Cir. 1997). "The most natural reading of the statute indicates that Congress intended to require complete exhaustion of

Executive remedies before invocation of the judicial process." McNeil, 508 U.S. at 112.

Although Sayyah filed a medical malpractice administrative claim notice with the VA after his cancer was diagnosed, an administrative claim for wrongful death was never presented to the agency. Warrum argues that the malpractice administrative claim should suffice for the FTCA's exhaustion requirement for the wrongful death action because it is well known that death often results from cancer. The VA, he argues, had notice in 2000 of the claim related to Sayyah's cancer misdiagnosis and should have known that his death—and a wrongful death suit—might ensue. The government argues that under Indiana law a claim for wrongful death is separate and distinct from a personal injury claim for medical malpractice, and the federal rule is that a wrongful death claim under the FTCA does not accrue until the date of death. Thus, says the government, in a wrongful death case, [5] § 2675(a) requires the presentation of an dministrative claim *for the death* before a wrongful death suit under the FTCA may be initiated.

A straightforward reading of the statute supports the government's position: "[a]n action shall not be instituted upon a claim against the United States for money damages for . . . personal injury or death . . . unless the claimant *shall have first presented the claim* to the appropriate Federal agency. . . . " 28 U.S.C. § 2675(a) (emphasis added). This is an action on a claim against the United States for money damages for a

death, but it was not preceded by an administrative claim for a *death*.

Our case law on the FTCA's statute of limitations also supports the government's position. We addressed the question of wrongful death claim accrual under the FTCA in Fisk. There, the plaintiff was subjected to negligent medical treatment in 1950, but his death did not occur until complications from the malpractice surfaced nearly thirty years later. Id. at 169. The government argued (in contrast to the present case) that Fisk's wrongful death claim was time-barred by the FTCA's two-year statute of limitations because the wrongful death claim had accrued at the same time as Fisk's medical malpractice claim—in 1950. We disagreed.

We began our analysis in Fisk by referring to the general rule of wrongful death claim accrual under the FTCA: "in an 'ordinary' wrongful death action under the FTCA[,] the federal rule is that the cause of action accrues upon the date of death." *Id.* at 170. We then noted that in Indiana, a claim for wrongful death is independent and not derivative of the underlying claim for personal injury, and the occurrence of a death was an essential element of a wrongful death cause of action. Id. at 170-71. "[U]ntil the death of the plaintiff's decedent there can be no claim for wrongful death, because until that event occurs, the [6] damages the statute is intended to remedy have not been inflicted on the plaintiff." Id. at 171 (citing *Louisville, Evansville, & St. Louis R.R. v. Clarke*, 152 U.S. 230, 238 (1894)).

We noted in Fisk that "[t]he purpose of the [Indiana Wrongful Death] statute is not to compensate for the injury to the decedent, but rather to create a cause of action to provide a means by which the decedent's survivors may be compensated for the loss they have sustained by reason of the death." Id. at 170; see also *Reeder v. Harper*, 788 N.E.2d1236, 1242 (Ind. 2003). Thus, because Indiana treats a wrongful death claim as substantively distinct from the underlying personal injury claim, we held that a wrongful death claim stemming from medical malpractice does not accrue for purposes of the FTCA's statute of limitations until the date of death. Fisk, 657 F.2d at 170-72. "[T]he wrongful acts of 1950 gave rise to two separate claims: a personal injury claim of the decedent, to which the Government was exposed for two years after it accrued, . . . and a wrongful death claim of the decedent's survivors, to which the Government was exposed for two years after it accrued." Id. at 172. See also *Johnston v. United States*, 85 F.3d 217, 222 (5th Cir. 1996); but cf. *Chomic v. United States*, 377 F.3d 607 (6th Cir. 2004) (holding that in states with derivative rather than independent wrongful death causes of action, claim accrues when person knows of injury and cause).

Applying the reasoning of *Fisk* to the present case, we agree with the district court that the wrongful death claim at issue here did not accrue and could not have been presented to the VA until the date of Sayyah's death. As such, the earlier medical malpractice administrative claim did not suffice as a death "claim"

under § 2675(a). Warrum never presented an administrative claim to the VA for damages for Sayyah's death. Accordingly, this action was [7] properly dismissed for failure to comply with the FTCA's administrative exhaustion requirement.

This result comports with the exhaustion requirement's purpose of allowing the relevant government agency the opportunity to investigate and settle meritorious claims lodged against it. See *Romulus v. United States*, 160 F.3d 131, 132 (2d Cir. 1998) (per curiam) ("A claim must be specific enough to serve the purpose of the FTCA to enable the federal government to expedite the fair settlement of tort claims."); see also *Kanar*, 118 F.3d at 531; *Charlton*, 743 F.2d at 559-60. As we have discussed, under Indiana law, a wrongful death claim "is designed to compensate for the loss to the survivors caused by the decedent's death, and not the underlying injury." *Holmes v. ACandS, Inc.*, 709 N.E.2d 36, 39 (Ind. Ct. App. 1999). Such a claim necessarily involves causation and damages questions distinct from those at issue in a malpractice claim that does not involve a death. In order to meaningfully evaluate the extent of its liability in a death case, the federal agency must have notice of the death, not merely an assertion of medical malpractice. Indeed, in the case of a claim based on death, the applicable regulations allow the government to request the names of the decedent's survivors as well as the "[d]egree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death." 28 C.F.R. § 14.4(a)(3)-(4). This information

bears directly on the damages potentially arising out of a wrongful death cause of action under Indiana law.

Warrum seeks to get around Fisk by invoking a change in Indiana law since Fisk was decided. In particular, he notes that Indiana law now requires wrongful death actions based on medical malpractice to be brought under Indiana's medical malpractice statutory scheme, which includes a statute of limitations that requires claims to be brought within two years of the act of medical negligence. [8] See *Hopster v. Burgeson*, 750 N.E.2d 841, 852-53 (Ind. Ct. App. 2001); *Frady v. Hedgcock*, 497 N.E.2d 620, 622 (Ind. Ct. App. 1986). Warrum argues this development means that in the medi cal malpractice context, Indiana law no longer recognizes wrongful death actions as independent claims. We disagree. The change in the applicable statute of limitations for wrongful death claims based upon medical malpractice did not alter the substantive nature of a wrongful death claim under Indiana law[1]. What was true at the time of Fisk is still true today: Indiana law regards a wrongful death claim as independent of a personal injury claim that might have been possessed by the decedent before death. See *Chamberlain v.*

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[1] We note that there is some question as to whether Indiana's medical malpractice statute of limitations scheme violates the state constitution. See *Morrison v. Sadler*, 821 N.E.2d 15, 22 n.7 (Ind. App. 2005); *Ellenwine v. Fairly*, 818 N.E.2d 961, 969-70 (Ind. App. 2004). See generally Martin v. Ritchey, 711 N.E.2d 1273 (Ind. 1999).

Walpole, 822 N.E.2d 959, 963 (Ind. 2005) (holding that the Indiana Medical Malpractice Act did not create new claims for relief, but "merely requires that claims for medical malpractice that are otherwise recognized under tort law and applicable statutes be pursued through the procedures" of the Act).

In any event, as we specifically noted in *Fisk*, the issue "is not one of choice between conflicting [state] statutes of limitations or accrual dates, but rather one of ascertaining the intent of Congress in enacting the FTCA and its limitations period." *Fisk*, 657 F.2d at 171. Although this case concerns the FTCA's exhaustion requirement and not its limitations period, the point is the same: the change in Indiana's statute of limitations for medical malpractice death claims does not affect the administrative exhaustion requirement of § 2675(a). Because under *Fisk* the wrongful [9] death claim did not accrue until Sayyah's death in 2002, the presentation of Sayyah's malpractice administrative claim notice in 2000 did not satisfy the exhaustion requirement of § 2675(a) for purposes of this FTCA wrongful death action.

A final point: Warrum argues that the complaint can be read not just as a wrongful death action but also as a survival claim based on Indiana's "increased risk of harm" or "loss of chance" doctrine. This theory allows recovery against a defendant "whose negligence significantly increases the probability of the ultimate harm, even if the likelihood of incurring that injury was greater than fifty percent in the absence of the defendant's negligence." *Cahoon v. Cummings*, 734

N.E.2d 535, 539 (Ind. 2000). But the Indiana Supreme Court held in Cahoon that "a plaintiff cannot recover on both a wrongful death claim and a claim of an increased risk of harm caused by the same wrong." Id. at 544. Warrum concedes this, but argues that a survivor can bring an increased risk of harm claim if the death resulted from another cause. For instance, if the death resulted from a separate, unrelated cause—suppose the decedent were struck by a car—a plaintiff could pursue both causes of action because in that instance the wrongful death claim would not subsume the negligence claim for increased risk of harm. But "[i]f the alleged result of the defendant's acts that increase the risk of harm is death itself," then a separate claim based on increased risk of harm is unavailable. Id. Here, the complaint plainly alleges that the cancer misdiagnosis caused Sayyah's death; it cannot be construed to allege a cause of action based upon the increased risk of harm doctrine.

The judgment of the district court is AFFIRMED

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A true Copy:
Teste:

_____

Clerk of the United States Court of
Appeals for the Seventh Circuit
USCA-02-C-0072—10-25-05

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISON

RONALD WARRUM, in his capacity as Personal Representative of the Estate of JOSEPH F. SAYYAH, Deceased, Plaintiff,	)
vs.	)
UNITED STATES OF AMERICA, Defendant.	)

ENTRY ON THE UNITED STATES OF AMERICA'S MOTION TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Before the court is the United States of America's ("government") Motion to Dismiss and Alternative Motion for Summary judgment. For the reasons set forth below, the Government's Motion to Dismiss is **GRANTED**.

I. Facts

1. The Department of Veterans Affairs received an administrative tort claim notice from Joseph Sayyah ("Mr. Sayyah") on December 22, 2000.

2. The basis of the claim in the administrative tort claim notice was "failure by the

doctors and medical staff at Evansville, Indiana VA Clinic to timely diagnose cancer of the esophagus." (*See* Standard Form ("SF") 95, Part 8).

3. The injury which formed the basis of the claim was "[f]ailure to timely diagnose cancer of the esophagus leading to a decreased chance of favorable treatment of the claimant's cancer.) (*See* SF 95, Part 10).

4. Such claim was denied on November 27, 2001. (Affidavit of John Houff ("Houff Aff." Aff., ¶ 5).

5. The Department of Veterans Affairs has not received an administrative tort claim notice asserting a claim in connection with the death of Mr. Sayyah. (Houff Aff., ¶ 6).

6. Mr. Sayyah died on February 4, 2002. (Houff Aff., ¶ 7).

7. The Complaint filed in this case is brought by Ronald Warrum, in his capacity as personal representative of the estate of Joseph F. Sayyah, deceased ("Plaintiff"). (Complaint, ¶ 2).

II. Discussion

The Government's motion to dismiss alleges that the court does not have subject matter jurisdiction over this case due to Plaintiff's failure to comply with the notice requirements of the Federal Tort Claims Act ("FTCA"). A motion to dismiss challenging the court's jurisdiction is filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Unlike a motion to dismiss filed pursuant to Rule 12(b)(1), a Rule 12(b)(1) motion may include matters outside of the pleadings, *English v. Comwell,* 10 F.3d 434, 437 (7th

Cir. 1993). The court will therefore treat this motion as one to dismiss.

Suits under the FTCA may only be brought under terms and conditions strictly prescribed by Congress. *McNeil v. United States,* 508 U.S. 106, 113 (1993). In *McNeil,* the Supreme Court held that: "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 113 (citing *Mohasco Corp. v. Silver*, 447 807, 826 (1980)).

The FTCA provides in relevant part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property of personal injury...caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

28 U.S.C. § 2675(a). The unambiguous language of the FTCA clearly requires a claimant to first file with the appropriate federal agency before legal action can

be instituted. 28 U.S.C. § 2675(a), *McNeil*, 508 U.S. 106 (1983); *Richardson v. United States*, 831 F.Supp. 657, 661 (N.D. Ind. 1993); *Miller v. United States Postal Service*, 815 F.Supp 1195, 1201 (S.D. Ind. 1993). The underlying purpose of Section 2675(a) is to allow the administrative agency to settle meritorious cases more quickly without the need for filing suit and before the costs of litigation. *McNeil*, 508 U.S. at 112 n.7. In *McNeil*, the Supreme Court noted that "[t]he interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command." *Id.* at 112.

In this case, it is undisputed that Plaintiff did not give notice to the Department of Veterans Affairs of the wrongful death claim that is now asserted in the Complaint. The fact that Mr. Sayyah gave notice of a medical malpractice claim prior to his death does not serve to save the Plaintiff's claim, because a claim for wrongful death dos not accrue for purposes of the FTCA until the date of death. *See Fisk v. United States,* 657 F.2d 167, 173 (7th Cir. 1981) ("the federal rule in wrongful death actions brought under the Federal Tort Claims Act is that the cause of action cannot accrue until the wrongful death occurs."). As Plaintiff's wrongful death claim had not accrued at the time of the filing of the administrative tort claim notice, it could have been "presented" to the agency by the filing of the administrative tort claim notice. Plaintiff's claim must therefore be dismissed.

Plaintiff asserts that his Complaint also states a claim under the Indiana Survival Statute, Ind. Code §

34-9-3-1, *et seq.*[2] under the "loss of chance" or "increased risk of harm" doctrine. This doctrine applies when a plaintiff's chances for long-tem survival are allegedly substantially decreased due to the negligence of the defendant. *Cahoon v. Cummings*, 734 N.E.2d 535, 544 (Ind. 2000); *Alexander & Alexander v. Scheid & Orthopaedics Indianapolis, Inc.*, 726 N.E.2d 272, 281-282 (Ind. 2000). However, a personal representative may only bring a claim for increased risk of harm if the plaintiff's death was the result of a cause of death. *Cahoon*, 734 N.E.2d at 544 ("It is possible, however, for a representative to bring a

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[2] The Indiana Survival Statute, provides as follows:

(a) If an individual who is entitled or liable in a cause of action dies, the cause of action survives and may be brought by or against the representative of the deceased party except actions for:

****

(6) personal injuries to the deceased party.

In addition, Indiana Code § 34-93-4, which applies when a person "receives personal injuries caused by the wrongful act or omission of another" and subsequently dies from causes other than those personal injuries, provides that:

> The personal representative of the decedent who injured may maintain an action against the wrongdoer to
> Recover all damages resulting before the date of death from those injuries that the decedent would have
> been entitled to recover had the decedent lived. The damages inure to the exclusive benefit of the
> decedent's estate.

Ind. Code § 34-9-3-4.

survival action on an increased risk of harm claim even where the plaintiff has died, if the death resulted from another cause."). In this case, Plaintiff's claim against the Government is that the death of Mr. Sayyah was caused by the Government's negligence. Thus, Plaintiff's claim under the Indiana Survival Statute is not preserved.

III. Conclusion

Because Plaintiff failed to give the Government notice of this wrongful death claim under FTCA, Plaintiff's wrongful death claim must be dismissed. In addition, to the extent Plaintiff's Complaint states a claim under the Indiana Survival Statute, such claim must also be dismissed, since the Complaint alleges that the cause of Mr. Sayyah's death was the Government's negligence, and not some other cause. The Government's Motion to Dismiss is therefore **GRANTED**.

SO ORDERED this 17th day of September 2004.

/s/

Richard L. Young

RICHARD L. YOUNG, JUDGE

United States District Court

Southern District of Indiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinios 60604

February 14, 2006

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DIANE S. SYKES, Circuit Judge.

No. 04-3753
RONALD WARRUM, in his capacity as
Personal Representative of the Estate of
JOSEPH F.SAYYAH, Deceased,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville
Division.
No. 02 C 92—Richard L. Young, Judge.

ORDER

On consideration of plaintiff-appellant's petition for rehearing and petition for rehearing en

banc, no judge in active service has requested a vote on the petition for rehearing en banc and all the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and rehearing en banc is DENIED.

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No. 05-1468

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In the Supreme Court of the United States

RONALD WARRUM, IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSEPH F. SAYYAH, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a State in which a decedent's death extinguishes his cause of action for personal injury and gives rise to a distinct wrongful death cause of action to compensate his survivors, an administrative claim filed by the decedent before his death to recover for his own personal injuries satisfies the administrative exhaustion requirement of the Federal Tort Claims Act, 28 U.S.C. 2675(a), with respect to a wrongful death suit subsequently brought in district court on behalf of the survivors.

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In the Supreme Court of the United States

No. 05-1468

RONALD WARRUM, IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSEPH F. SAYYAH, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-12) is reported at 427 F.3d 1048. The opinion of the district court (Pet. App. 14-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2005. A petition for rehearing was denied on February 14, 2006 (Pet. App. 20-21). The petition for a writ of certiorari was filed on May 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subject to certain restrictions, the Federal Tort Claims Act (FTCA or Act) effects a waiver of sovereign

immunity for tort claims against the United States "under circumstances where the *United States, if a private* person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The phrase "law of the place" has been construed to incorporate by reference the substantive provisions of the law of the particular State in which the wrong occurred. See *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994).

Although the United States' substantive liability differs from State to State, the FTCA establishes certain uniform procedural requirements that limit the United States' waiver of immunity. Section 2675(a) establishes a requirement of administrative exhaustion: "[a]n action shall not be instituted" under the FTCA "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. 2675(a). The failure of the agency to make a final disposition of the claim within six months after it is filed shall, at the option of the claimant, be deemed a final denial of the claim. *Ibid.* Section 2401(b) establishes the time limitations for filing an administrative claim and, subsequently, an action in district court: "A tort claim against the United States shall be forever barred [1] unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or [2] unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b).

2. Petitioner is the personal representative of the estate of Joseph Sayyah, who died after receiving care

at a government-run medical facility. Petitioner contends that in September 1998, Sayyah was treated at the Department of Veterans Affairs (VA) clinic in Evansville, Indiana, by a VA doctor who failed to diagnose properly his medical condition. Pet. App. 3. Later, in March 1999, Sayyah was diagnosed as suffering from Stage III cancer of the esophagus. *Ibid.* In December 2000, Sayyah filed an administrative claim with the VA, alleging that the Evansville VA clinic had failed to diagnose his cancer, resulting in a decreased chance of favorable treatment. *Ibid.*[1] The VA denied Sayyah's claim on November 27, 2001; he died on February 4, 2002. *Ibid.* On May 22, 2002, petitioner, as personal representative of Sayyah's estate, filed this wrongful death suit against the United States pursuant to the FTCA, alleging that the misdiagnosis at the Evansville VA clinic resulted in Sayyah's death. *Id.* at 4. Neither petitioner nor anyone else presented an administrative tort claim notice to the VA asserting a claim in connection with Sayyah's death. *Id.* at 15.

3. The district court granted the government's motion to dismiss based upon petitioner's failure to file an administrative claim for wrongful death prior to instituting suit. Pet. App. 14-19. The court observed that it was "undisputed that [petitioner] did not give notice to the [VA] of the wrongful death claim that is now asserted in the Complaint." *Id.* at 17. Moreover, the court noted, "[t]he fact that Mr. Sayyah gave notice of a medical mal-

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[1] Sayyah's administrative claim was timely with respect to his personal injury claim because it was filed within two years of the date on which he learned of the cancer that the VA physician had failed to diagnose earlier. See *United States* v. *Kubrick*, 444 U.S. 111, 122-124 (1979) (medical malpractice claim accrues under the FTCA when plaintiff knows of both the existence and cause of the injury).

practice claim prior to his death does not serve to save [petitioner's] claim, because a claim for wrongful death do[e]s not accrue for purposes of the FTCA until the date of death." *Ibid.* (citing *Fisk* v. *United States*, 657 F.2d 167, 173 (7th Cir. 1981)). Because petitioner's wrongful death claim had not accrued at the time Sayyah filed his administrative claim for personal injury, the court held, "it could [not] have been 'presented'" to the VA by the filing of that administrative claim. *Ibid.* (alteration to conform to original).

The district court also rejected petitioner's assertion that the complaint states a separate claim under Indiana's survival statute, Ind. Code §§ 34-9-3-1 *et seq.* (1998). Pet. App. 17-18. Under the Indiana survival statute, a cause of action for personal injuries is generally extinguished by the injured person's death. Ind. Code § 34-9-3-1(a)(6) (1998). There is a narrow exception to that rule under which a personal injury claim survives and may be maintained to recover the decedent's damages from the injury before his death, but only if the injured party dies from a different cause. See *id.* at § 34-9-3-4. Here, the court concluded, both the personal injury and wrongful death are alleged to have been caused by the same government negligence, and, thus, the personal injury claim "is not preserved" by the narrow exception created by Indiana's survival statute. Pet. App. 19.

4. The court of appeals affirmed. Pet. App. 2-12. The court noted that because state law "determine[s] the substantive nature of the plaintiff's cause of action" under the FTCA, petitioner's cause of action is governed by Indiana law. *Id.* at 4-5. Under Indiana's wrongful death statute, a cause of action for wrongful death "is independent and not derivative of the underlying claim

for personal injury." *Id.* at 7 (citing *Fisk*, 657 F.2d at 170-171). A wrongful death action is intended "not to compensate for the injury to the decedent, but rather to create a cause of action to provide a means by which the decedent's survivors may be compensated for the loss they have sustained by reason of the death." *Id.* at 8 (quoting *Fisk*, 657 F.2d at 170). In such circumstances, "a wrongful death claim stemming from medical malpractice does not accrue for purposes of the FTCA's statute of limitations until the date of death." *Ibid.* (citing *Fisk*, 657 F.2d at 170-172); see *id.* at 7 ("[U]ntil the death of the plaintiff's decedent there can be no claim for wrongful death, because until that event occurs, the damages the statute is intended to remedy have not been inflicted on the plaintiff.") (quoting *Fisk*, 657 F.2d at 171). Thus, the court of appeals "agree[d] with the district court that the wrongful death claim at issue here did not accrue and could not have been presented to the VA until the date of Sayyah's death." *Id.* at 8.

The court further explained that dismissal of this suit for failure to file an administrative claim for wrongful death comports with "[a] straightforward reading of" Section 2675(a), under which suit against the United States on a claim for money damages for "personal injury or death" may not be instituted "unless the claimant *shall have first presented the claim* to the appropriate Federal agency." Pet. App. 6. This is a suit "for money damages for a *death*, but it was not preceded by an administrative claim for a *death*." *Id.* at 6-7. Moreover, the court continued, requiring an administrative claim for wrongful death "comports with the exhaustion requirement's purpose of allowing the relevant government agency the opportunity to investigate and settle meritorious claims lodged against it," because a wrong-

ful death claim to compensate the decedent's survivors for their losses due to his death "necessarily involves causation and damages questions distinct from those at issue in a malpractice claim that does not involve a death." *Id.* at 9 (citations omitted). Thus, the court concluded, "to meaningfully evaluate the extent of its liability in a death case, the federal agency must have notice of the death, not merely an assertion of medical malpractice." *Ibid.*

The court of appeals rejected petitioner's contention that a procedural change in Indiana law, which bars wrongful death actions based upon medical malpractice that are brought more than two years after the alleged act of medical negligence, means that a wrongful death action arising from medical malpractice is no longer an independent claim. Pet. App. 10-11. The court explained that the Indiana Medical Malpractice Act "did not alter the substantive nature of a wrongful death claim under Indiana law" (*id.* at 10) or "create new claims for relief" (*id.* at 11); rather, it only required "otherwise recognized" tort claims arising in the medical malpractice context to be "'pursued through the procedures' of the Act." *Ibid.* (quoting *Chamberlain* v. *Walpole*, 822 N.E. 2d 959, 963 (Ind. 2005)). In any event, the court noted, for purposes of the FTCA, federal law governs procedural matters such as the statute of limitations, accrual dates, and exhaustion. *Ibid.* (citing *Fisk*, 652 F.2d at 171); see *id.* at 5 ("the FTCA imposes its own procedural rules").

Finally, the court of appeals upheld the rejection of petitioner's asserted "survival" personal injury claim, because that claim is based on the same alleged negligence as the wrongful death claim, and thus does not satisfy the requirement of the Indiana survival statute

that the claimant's death must have resulted from a different cause in order for his personal injury claim to survive his death. Pet. App. 11-12.

ARGUMENT

Petitioner challenges (Pet. 6-17) the decision of the court of appeals that a cause of action for wrongful death on behalf of a decedent's survivors under Indiana's wrongful death statute is a separate "claim" for purposes of the FTCA's administrative exhaustion requirement than the "claim" on behalf of the decedent for personal injury. That decision is correct and does not conflict with any decision of this Court. The only other court of appeals decision with which the opinion below arguably conflicts pre-dates and is inconsistent with this Court's most recent precedent concerning the FTCA's administrative filing requirement. Further review is therefore unwarranted. Petitioner additionally claims (Pet. 17-22) that the court of appeals misapplied Indiana's survival statute. That question of state law does not warrant this Court's review and, in any event, a decision of the State Supreme Court confirms that the court of appeals' construction of state law was correct.

1. a. The court of appeals correctly concluded that Sayyah's administrative claim regarding his own personal injuries did not encompass a claim on behalf of his survivors for the losses they suffered as a consequence of Sayyah's wrongful death. A wrongful death action under Indiana law compensates different damages suffered by different persons, arising at a different time, than a claim by the decedent for his own personal injury. Both the text of the FTCA and the purposes of its administrative exhaustion requirement support the court of appeals' conclusion that a wrongful death action is a

different "claim" that must be filed separately with the administrative agency.

The text of the FTCA's limitations period states that a "tort claim" must be "presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. 2401(a). That language assumes that a distinct cause of action, with a different accrual date, is a separate "claim" for purposes of the FTCA's exhaustion requirement. That conclusion is reinforced, when the new cause of action is on behalf of a different person for different injuries, by additional text of the exhaustion provision itself, which requires that "*the claimant* shall have first presented the claim to the appropriate Federal agency and *his claim* shall have been finally denied by the agency." 28 U.S.C. 2675(a) (emphases added).

As this Court has explained, the purpose of the FTCA's administrative claim requirement is to afford the government a "fair opportunity to investigate and possibly settle the claim before the parties must assume the burden of costly and time-consuming litigation." *McNeil* v. *United States*, 508 U.S. 106, 111-112 (1993); see S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966) (requiring presentation of an administrative claim as a prerequisite to suit will "ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States"). To that end, the administrative claim must do two things: it must provide the agency with "the relevant facts in enough detail to alert the [agency] to the presence of" the claim, and it must request "a sum certain for those injuries." *Palay* v. *United States*, 349 F.3d 418, 425 (7th Cir. 2003). See also *Goodman* v. *United States*, 298 F.3d

1048, 1055 (9th Cir. 2002) (FTCA administrative claim must "contain[] a general description of the time, place, cause and general nature of the injury and the amount of compensation demanded."); *Burchfield* v. *United States*, 168 F.3d 1252, 1255 (11th Cir. 1999) (administrative claim must provide "written notice of [the claimant's] claim sufficient to enable the agency to investigate" and must "place[] a value on [the] claim"); *Romulus* v. *United States*, 160 F.3d 131, 132 (2d Cir. 1998) (per curiam) ("A claim must be specific enough to serve the purpose of the FTCA to enable the federal government to expedite the fair settlement of tort claims.").

Applying the statutory text in light of these purposes, the courts of appeals have held in numerous circumstances that an administrative claim filed by one individual does not satisfy the exhaustion requirement with respect to another individual's claim, "even though the third party's filing arguably puts the government on notice of the plaintiff's injury." *Brown* v. *United States*, 838 F.2d 1157, 1163 (11th Cir. 1988) (Tjoflat, J., concurring) (citing *Rucker* v. *United States*, 798 F.2d 891 (6th Cir. 1986); *Johnson* v. *United States*, 704 F.2d 1431 (9th Cir. 1983)). See *Manko* v. *United States*, 830 F.2d 831, 840 (8th Cir. 1987) (husband's administrative claim regarding personal injury did not satisfy the exhaustion requirement regarding his wife's claim for loss of consortium, even though the claim referred to her and "suggested that she had suffered a loss of consortium"); *Jackson* v. *United States*, 730 F.2d 808 (D.C. Cir. 1984) (administrative claim for wrongful death by decedent's parents did not satisfy exhaustion requirement with respect to survival claim or wrongful death claim by decedent's widow); *Lunsford* v. *United States*, 570 F.2d 221 (8th Cir. 1977) (unnamed members of a plaintiff class

ordinarily cannot rely on an administrative filing by a named class representative); *Caidin* v. *United States*, 564 F.2d 284 (9th Cir. 1977) (same).

b. The court of appeals correctly applied those principles to the facts of this case, in light of the substantive law of Indiana that gives rise to the underlying claims. The court of appeals correctly recognized that, under Indiana law, an injured party's claim for personal injury is extinguished upon that person's death, except for narrow circumstances not present here. See p. 21, *infra*. A new claim for wrongful death then accrues, and it may be brought by the decedent's personal representative on behalf of the decedent's survivors. The measure of damages in a wrongful death action is almost entirely distinct from the measure that would have been applicable in a suit brought by the injured person himself. Pet. App. 7-9.

The Supreme Court of Indiana has since confirmed the court of appeals' understanding of state law. In *Ellenwine* v. *Fairley*, 846 N.E.2d 657 (Ind. 2006), the Supreme Court stressed the "important distinction between the types of claims which may be brought as a result of alleged malpractice": a "negligence claim brought by or on behalf of the injured party," and a "wrongful death claim brought by the survivors of the party physically injured by the alleged malpractice." *Id.* at 662. Whereas the "negligence claim arises as soon as the negligent act occurs," the claim for wrongful death "does not exist until the exact moment that the individual dies," *id.* at 663, at which time "the malpractice claim * * * terminates," *id.* at 665 (citing Ind. Code § 34-9-3-1(a)(6) (2004)). The court found it "clear and obvious" that "a negligence claim and a wrongful death claim are two wholly separate causes of action[] which

must be brought by different parties and which, for the most part, provide damages for separate types of injuries." *Id.* at 662. Indeed, hospital and health care expenses are the "only measure of damages which is consistent between those recoverable in a negligence action and those recoverable in a wrongful death action." *Ibid.*[2]

In light of the complete separation under Indiana law between a personal injury claim and a wrongful death claim, the court of appeals was correct in holding that Sayyah's administrative claim regarding his own personal injuries, filed more than a year prior to his death, did not and could not satisfy the administrative exhaustion requirement for a wrongful death that accrued upon his death and was brought on behalf of his survivors to compensate them for their own losses. That is so not only as a legal matter, but also as a factual matter. Sayyah's administrative claim did not contain the facts that would be essential for the agency to fairly investigate and possibly settle a wrongful death claim —including the time, cause and circumstances of death and the amount of compensation claimed by the decedent's estate or dependents for their losses on account of the death—facts that could not be known until death had actually occurred. Without that information, the government could not fairly investigate or determine the extent of its liability, if any, for a death that had not yet

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[2] See, *e.g.*, *Elmer Buchta Trucking, Inc.* v. *Stanley*, 744 N.E.2d 939, 942-943 (Ind. 2001) (noting that, in a wrongful death action, "the damages are limited to the pecuniary loss suffered by those for whose benefit the action may be maintained," and that, therefore, a deduction must be made from the decedent's expected earnings "for the amount of personal maintenance expenses that the decedent would have incurred over the remainder of his lifetime").

occurred, nor could it determine a fair settlement value for the losses of survivors.

It is not enough for petitioner to assert that Sayyah's medical malpractice claim "put the government on notice of a potential wrongful death cause of action" (Pet. 13) because it is a "known fact that patients who suffer from undiagnosed or misdiagnosed cancer tend to die" (Pet. 12). This Court rejected that approach to the administrative exhaustion requirement in *McNeil*. In that case, the claimant brought suit under the FTCA for personal injury, then four months later he filed an administrative claim. 508 U.S. at 108. While the suit was pending, the agency denied the administrative claim, and the claimant sought to proceed with his prematurely-filed suit. *Ibid.* This Court, upholding dismissal of the suit, stressed that the statutory command of Section 2675(a) that "an 'action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied'" is "unambiguous," and that the courts "are not free to rewrite the statutory text." *Id.* at 111. Nor, the Court held, could strict "adherence to the straightforward statutory command" of administrative exhaustion prior to suit be dispensed with even when the agency in fact had a fair opportunity to investigate the same claim before the litigation had substantially progressed. *Id.* at 111-112. The Court recognized that, although it is tempting in a particular case to say that compliance with the administrative claim requirement was close enough, if not technically proper, because "the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims." *Id.* at 112. Under *McNeil*, it is clear that petitioner's (incorrect) assertion that the government was suffi-

ciently aware that a wrongful death claim on behalf of his survivors might arise does not excuse the need to comply with the requirements of administrative exhaustion should such a claim in fact arise.[3]

2. a. Contrary to petitioner's contention, there is no need for this Court to grant review of the court of appeals' correct decision in order to resolve a conflict among the circuits. The only court of appeals decision with which the judgment below arguably conflicts is that of the Eleventh Circuit 18 years ago in *Brown* v. *United States*, 838 F.2d 1157 (1988). In *Brown*, the decedent had administratively exhausted his claim for medical malpractice before filing an FTCA suit in district court, and the decedent's personal representative had filed an administrative claim with respect to a wrongful death claim under Florida law a week before she sought to add the wrongful death claim to the FTCA action. *Id.* at 1158-1159. The Eleventh Circuit held in those circumstances that the district court had jurisdiction over the wrongful death claim, even though "a Florida wrongful death action is clearly distinct from a personal injury action." *Id.* at 1161.

The *Brown* decision appears to have been influenced by the fact that the personal representative had filed an administrative claim for wrongful death and that it did "not appear from the record that any substantial action

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[3] The fact that a claimant's personal injury claim is denied by the agency does not mean that filing an administrative claim for wrongful death would be a meaningless exercise. Other facts may have developed in the interim to support (or negate or mitigate) a wrongful death claim. Moreover, whereas the original personal injury claim may be comprised largely of hard-to-verify claims for pain and suffering, the wrongful death claim may involve more easily ascertainable economic damages.

was taken" by the agency, although more than six months had passed after the claim was filed before the wrongful death action was tried. 838 F.2d at 1159-1160, 1161 & n.7. That fact, combined with the court of appeals' belief that "[i]t is unlikely that the agency would conduct a second investigation or otherwise act any differently," led the Eleventh Circuit to hold that requiring the personal representative separately to exhaust the administrative claim procedure would be "overly technical" and "serve no useful purpose." *Id.* at 1161.[4]

Significantly, *Brown* was decided before this Court's decision in *McNeil*. As discussed above, *McNeil* is incompatible with the view in *Brown* that the courts should eschew a "technical" application of the exhaustion requirement. In particular, *McNeil* rejected any notion that a court could rely on the fact that an administrative claim was ultimately denied to excuse the premature filing of an FTCA action. Because the Eleventh Circuit has not had an opportunity to review its *Brown* decision in light of *McNeil*, it is uncertain whether there will ever be a need for this Court to review the supposed conflict identified by petitioner.

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[4] Judge Tjoflat concurred in the judgment on the separate ground that the United States was entitled to a complete setoff against the plaintiff's recovery. He vigorously disputed, however, the *Brown* majority's assumption that no further facts would be needed, and no purpose served, by a full administrative consideration of the wrongful death claim. See 838 F.2d at 1164 (citing the "substantially different * * * measure of damages" for the two types of claims, which would require development of "information that the government would not have had any reason to seek out when investigating the settlement value of the personal injury claim"); see also *id.* at 1164 nn. 2-3; *id.* at 1163 (describing the executor as a "claimant who never filed an administrative claim in the first place" and who "seek[s] to rely on the filing of another claimant who suffered a wholly distinct injury").

b. Petitioner's assertion (Pet. 7-12) of a conflict between the court of appeals' decision and other appellate decisions holding that an administrative claim need not articulate a theory of liability is mistaken. Notably, as petitioner concedes (Pet. 7), the Seventh Circuit has itself recognized that there is no requirement to specify a particular theory of liability in an administrative claim. See *Palay*, 349 F.3d at 425. There is no conflict between that rule and the Seventh Circuit's decision here because this case did not involve a mere change in the plaintiff's legal theory of liability, but a new and entirely different claim, which accrued at a different time, after the occurrence of a different event, on behalf of different beneficiaries, to compensate different injuries.

Tellingly, in all of the cases cited by petitioner with respect to this contention, all the events and elements of damages for which the plaintiff sought to recover in court occurred prior to the filing of the administrative claim, and the only issue before the court was whether —regardless of what theory of liability they would support—the facts set forth in the administrative claim provided sufficient notice of the plaintiff's injury and damages to allow the agency a fair opportunity to investigate and possibly settle the claim. See *Palay*, 349 F.3d at 425-427 (inmate's administrative claim of bodily injury, pain, suffering and repeated seizures resulting from his transfer to a holding unit at which a fight broke out between rival prison gangs sufficiently alerted the government to a claim for negligent reassignment); *Santiago-Ramirez* v. *Secretary of the Dep't of Defense*, 984 F.2d 16, 20 (1st Cir. 1993) (administrative claim asserting "emotional distress and mental suffering" from employer's interrogation, harassment and discharge of claimant on suspicion of theft satisfied the exhaustion

requirement for the employee's FTCA suit based on the same claims, but not for her husband's claim for loss of consortium); *Broudy* v. *United States*, 722 F.2d 566, 567-569 (9th Cir. 1983) (widow's administrative claim regarding husband's death from radiation exposure held sufficient to encompass a claim for failure to warn husband of the hazards of radiation exposure); *Goodman* v. *United States*, 298 F.3d 1048, 1052, 1057 (9th Cir. 2002) (widower's administrative claim alleging that his wife died of "mistakes" relating to an experimental treatment constituted exhaustion with respect to claim for lack of informed consent, as the agency's response demonstrated); *Burchfield* v. *United States*, 168 F.3d 1252, 1255 (11th Cir. 1999) (administrative claim alleging claimant developed osteoporosis and other maladies from steroid medication provided adequate notice of claim for failure to prescribe supplements to counteract adverse effects of the medication). Thus, none of those cases involved the circumstances presented here, where a party other than the administrative claimant seeks to sue on a claim arising in substantial part from facts not yet in existence when the administrative claim was filed.

3. Because the court of appeals' decision concerns the requirements of the FTCA's administrative exhaustion requirement, and whether petitioner may rely upon the administrative claim filed by Sayyah, petitioner's discussion of a purported circuit conflict regarding when a wrongful death action accrues for purposes of the FTCA's statute of limitations is not directly on point. In any event, although petitioner asserts (Pet. 13-14) an inconsistency between the decision below and decisions of the Fourth and Sixth Circuits in *Miller* v. *United States*, 932 F.2d 301 (4th Cir. 1991), and *Chomic* v. *United States*, 377 F.3d 607 (6th Cir. 2004), cert.

denied, 544 U.S. 948 (2005), a careful review of those cases demonstrates that any apparent inconsistencies are explained by substantive differences between the relevant States' laws regarding the claims asserted. In each case, the court looked to the substantive law of the State to determine the nature of the claim asserted and then looked to federal law to ascertain whether the claimant had met the procedural requirements for perfecting such a claim under the FTCA.

a. Because the FTCA does not create "new causes of action but [requires government] acceptance of liability under circumstances that would bring private liability into existence" under state law, *Feres* v. *United States*, 340 U.S. 135, 141 (1950), the date on which a cognizable injury comes into being for purposes of the federal limitations period in 28 U.S.C. 2401(b) necessarily depends on the nature of the cause of action under state law. See 28 U.S.C. 2674. The application of that principle has special significance in the wrongful death context, because the generic term "wrongful death" embraces two distinct causes of action—one, none, or both of which may be provided under state law. See Wex S. Malone, *The Genesis of Wrongful Death*, 17 Stan. L. Rev. 1043, 1044 (1964-1965). First, wrongful death can denote a new and *independent* cause of action asserted by third parties, usually close relatives of the decedent, for their own losses resulting from the death. Second, the term "wrongful death" is sometimes used to refer to a *survival* cause of action—that is, the decedent's own personal injury claim that pre-existed death and that, solely by operation of statute, "survives" death.

The Seventh Circuit's decisions in the present case and *Fisk* hold that a wrongful death cause of action accrues for purposes of the FTCA at the time of the dece-

dent's death. Pet. App. 8; *Fisk* v. *United States*, 657 F.2d 167, 171 (1981). Those cases applied the law of Indiana, which creates a statutory cause of action based on the decedent's death. See Pet. App. 7 ("[U]ntil the death of the plaintiff's decedent there can be no claim for wrongful death, because until that event occurs, the damages the statute is intended to remedy have not been inflicted on the plaintiff.") (quoting *Fisk*, 657 F.2d at 171, and citing *Louisville, Evansville & St. Louis R.R.* v. *Clarke*, 152 U.S. 230, 238 (1894)). See Restatement (Second) of Torts § 899 cmt. c (1979) ("A cause of action for death is complete when death occurs.").

In contrast, the law of Michigan (at issue in *Chomic*) "clearly provides not that death creates a cause of action, but that death does not extinguish an otherwise valid cause of action," and permits the decedent's personal representative to stand in the decedent's shoes. 377 F.3d at 611 (quoting *Hardy* v. *Maxheimer*, 416 N.W.2d 299, 307 n.17 (Mich. 1987)). Similarly, Virginia law (at issue in *Miller*) "does not create a new cause of action, but only a right of action in a personal representative to enforce the decedent's claim for any personal injury." 932 F.2d at 303. When an estate asserts a survival claim, "the statute of limitations necessarily runs from the time of [the decedent's] original injury," Restatement (Second) of Torts § 899 cmt. c, because that injury is the event giving rise to the claim. See *Chomic*, 377 F.3d at 612; *Miller*, 932 F.2d at 303-304. Death operates only to transfer the legal right to assert the claim from the decedent to his estate. Thus, the difference in the accrual times of the claims in the foregoing cases for purposes of deciding whether the claim was timely un-

der the FTCA is entirely explained by the substantive nature of the claim under state law.[5]

b. The fact that, as a matter of Indiana law, a wrongful death action in which the death was caused by medical malpractice must be brought within two years of the alleged malpractice, see Pet. 14-15; *Ellenwine*, 846 N.E.2d at 664-665, does not alter the conclusion that Sayyah's administrative claim for personal injury did not encompass the separate claim by his representative that arose after his death for the injuries suffered by his survivors as a result of that death. In *Ellenwine*, the Supreme Court of Indiana made clear that, despite the legislature's decision to bar wrongful death claims that accrue more than two years after the alleged malpractice that ultimately resulted in death, the wrongful death action is "wholly separate" from the injured

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[5] Texas law (at issue in *Johnston* v. *United States*, 85 F.3d 217 (5th Cir. 1996)) appears to be something of a hybrid. According to the Fifth Circuit, Texas's wrongful death statute "provides a statutory cause of action for damages arising from a negligently inflicted injury that causes an individual's death," but that statutory cause of action is "entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death." *Id.* at 222. In that context, the Fifth Circuit held that the cause of action accrued for purposes of the FTCA at the time of the decedent's death. *Id.* at 224 ("we are reticent to hold that a wrongful death action accrues pre-death"). Because of the differences between Indiana and Texas law, it is not clear that there is any inconsistency between the Fifth Circuit's holding in *Johnston* and the court of appeals' analysis here. Even if there were, however, it would not benefit petitioner. If, as petitioner contends (Pet. 15), the Fifth Circuit would hold that *all* wrongful death claims, of either the independent or derivative kind, accrue for FTCA purposes at the time of the decedent's death, that holding would support, rather than undermine, the Seventh Circuit's holding here that Sayyah's administrative claim for personal injuries filed while he was alive did not encompass a claim for wrongful death that did not accrue until later.

party's negligence claim, the two "must be brought by different parties," and the two, "for the most part, provide damages for separate types of injuries." 846 N.E.2d at 662.

Petitioner complains that, under the court of appeals' approach, "the liability of the United States is far broader than that of a private health care provider in Indiana." Pet. 14.[6] There is nothing remarkable, however, in the fact that the uniform federal two-year statute of limitations for FTCA claims will, in some cases, permit a suit to go forward that would be time-barred if brought in state court against a private party. See *Johnston*, 85 F.3d at 220 ("we look to state law to determine whether the plaintiff's action is premature, but to federal law to determine whether the action is stale") (citation and emphasis omitted); *id.* at 222 n. 6 (noting that Louisiana's statute of limitations for wrongful death claims is one year, and that "under the two-year FTCA limitations period the United States is exposed to liablity where a private person in Louisiana is not"). That is simply a function of the fact that Congress has adopted a separate federal statute of limitations to govern claims brought under the FTCA.[7]

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[6] We note that, if the Indiana statute were construed as a statute of repose, such that no cause of action for wrongful death can exist under state law (regardless of when it accrued) if more than two years passed between the time the medical care was provided and when the death occurred, that substantive limitation on liability under state law would also preclude a suit against the United States under the FTCA. See, *e.g.*, *Simmons* v. *United States*, 421 F.3d 1199 (11th Cir. 2005); *Simmons* v. *Sonyika*, 394 F.3d 1335 (11th Cir. 2004).

[7] The court of appeals observed that there is some question whether Indiana courts would hold that application of the state statute of limitations to cut off a claim before it accrues violates the State's constitution. See Pet. App. 10 (citing *Martin* v. *Ritchey*, 711 N.E.2d

4. Finally, petitioner's assertion (Pet. 17-19) that the court of appeals erred in failing to construe the complaint to state an alternative survival cause of action for Sayyah's medical malpractice claim does not warrant this Court's review. As both courts below noted (Pet. App. 12; *id.* at 17-19), a personal injury claim survives the injured party's death only if he "subsequently dies from causes other than those personal injuries." Ind. Code § 34-9-3-4 (1998). Indeed, the very case relied upon by petitioner, *Cahoon* v. *Cummings*, 734 N.E.2d 535 (Ind. 2000), makes clear that "[i]f the alleged result of the defendant's acts that increase the risk of harm is death itself," the only action available is one for wrongful death. *Id.* at 544; Pet. App. 12. Paragraph 12 of petitioner's complaint quite clearly states that "[a]s a result of [the] negligence, carelessness and medical malpractice of the defendant's employees, Sayyah's condition caused him to suffer pain, mental anguish, bodily injury and *ultimately caused his death*." See Pet. 19 (emphasis added). Thus it was petitioner's own allegation, and not the courts' misconstruction of state law, that defeated any survival claim.

1273 (Ind. 1999)). The Indiana Supreme Court did not address that question in *Ellenwine*, in which it held that, under the specific wrongful death and medical malpractice provisions relating to children, the limitations period for the wrongful death of a child is the first to expire of the medical malpractice limitations period (the child's eighth birthday) or the child wrongful death limitations period (two years from the date of death). 846 N.E.2d at 666.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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